Supreme Court, U.S.
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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

B. J. McADAMS, INC., DEBTOR

CONSTELLATION DEVELOPMENT CORP. PETITIONER

v.

JAMES F. DOWDEN, SUCCESSOR TRUSTEE, RICHARD L. SMITH, TRUSTEE AND UNITED STATES EX REL. INTERNAL REVENUE SERVICE RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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41 pp

PETITION FOR WRIT OF CERTIORARI

QUESTIONS PRESENTED FOR REVIEW

(i) WHETHER CDC WAS DENIED DUE PROCESS, AND TRIAL BY JURY, PURSUANT TO THE UNITED STATES CONSTITUTION, AMENDMENTS 5 AND 7, ON AN AMOUNT OF MONEY OF OVER ONE MILLION DOLLARS.

(ii) WHETHER THE UNITED STATES, BANKRUPTCY COURT, AS AFFIRMED BY THE U.S. DISTRICT COURT AND 8TH CIRCUIT COURT OF APPEALS ERRONEOUSLY APPLIED THE ALTER EGO DOCTRINE IN DECLARING CONSTELLATION DEVELOPMENT CORPORATION'S LIEN CLAIM AGAINST THE DEBTOR HERE NULL AND VOID.

(iii) WHETHER PIERCING THE CORPORATE VEIL OR ALTER EGO, AS IT IS KNOWN, IS NORMALLY TRIED BY JURY, WHEN FACTUAL ISSUES EXIST.

LIST OF PARTIES

I. ALL PARTIES APPEAR IN THE CAPTION OF THE CASE ON THE COVER PAGE.

II. PARENT AND NONWHOLLY OWNED SUBSIDARIES.

PLENTYWOOD IS THE PARENT COMPANY AND 100% OWNER OF CONSTELLATION DEVELOPMENT CORPORATION.

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(ii) BR Court Memorandum and Order, July 1, 1991

(iii) United States District Court Order and Memorandum, March 25, 1994

(iv) Eighth Circuit Court of Appeals Opinion, September 20, 1995

STATEMENT OF THE GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

(i) DATE OF THE ENTRY OF JUDGMENT OR DECREE SOUGHT TO BE REVIEWED.

The Eighth Circuit Court of Appeals Opinion, Order and Judgment of September 20, 1995.

(ii) DATE OF ORDERS REQUESTING REHEARINGS.

Eighth Circuit Court of Appeals Order, November 28, 1995.

(iii) NOT APPLICABLE.

(iv) STATUTORY PROVISIONS BELIEVED TO CONFER ON THIS COURT JURISDICTION TO REVIEW THE JUDGMENT OR DECREE IN QUESTION BY WRIT OF CERTIORARI:

1) 28 USC § 1254(i).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THIS CASE

i. Amendments 5 and 7 to the United States Constitution.

ii. 11 USC Subsections 101(31)(1), 105(a), 361(3), 362(d), 363(e)(f), 502(d), 506(d), 541(a)(1)(6), (b)(1), 542(a), 544(a)(b), 547(b)(4)(A)(B), 548(a)(1).

iii. 28 USC Subsections 157(a), (b)(1), (b)(2)(F)(H)(K), (b)(3), 1254(1), 1334(b).

iv. F.R.CIV.P. 8(a), 9(b), 38(b), 39(b).

v. Eastern District of Arkansas, Western Division Rule 32 I and II(a).

vi. Bankruptcy Rule 7001(2), 7008(a), 7009.

vii. Arkansas Code Annotated § 204.

STATEMENT OF THE CASE

Note: References to the lower court record, pursuant to Paragraph 7, Rule 29 of this court are made here. ("AP __") for record, ("A __") for Addendum, and ("TR __") for Transcript. Reference to the separate appendix here is by ("Ad __").

Jurisdiction in the Court of First Instance was pursuant to 28 USC § 157(a), as provided by, U.S. District Court, Eastern District of Arkansas, Western Division Rule 32 I and II(a), pursuant to 28 USC § 1334(b).

On March 28, 1990, the debtor was placed in involuntary bankruptcy in the Eastern District of

Arkansas, Western Division, Case No. 90-40695. Subsequently after a series of hearings lasting approximately one year, the subject cases came on for trial, starting April 8, 1991 and concluding on April 11, 1991. At the very beginning of trial, on the first day, CDC demanded trial by jury, and was denied same (Ad 98).

After submission of post trial briefs, and before the transcript was ordered, on June 13, 1991 Adversary Proceeding ("ADV") 90-4207 was denied (Ad 36). On June 26, 1991 ADV 90-4189 was denied by adopting the findings and conclusions reached in ADV. 90-4207 (Ad 38). CDC filed motions to amend on both, which were denied on July 29, 1991 (Ad 42).

On August 6, 1991 CDc filed notice of appeal to the District Court on both. Subsequently both were dismissed as not being timely.

On appeal to the Eighth Circuit ADV 90-4189 was reversed and remanded to the District Court. On March 25, 1994 the District Court affirmed the BR Court (Ad 17), CDC filed notice of appeal to the Eighth Circuit after the District Court denied a motion for rehearing by order entered August 15, 1994 (Ad 40). On September 20, 1995 by opinion and judgment, the 8th Circuit affirmed the District Court (Ad 2). CDC files this Writ of Certiorari after its petition for rehearing was denied November 28, 1995 (Ad 39).

FACTS OF THE CASE

A. AMENDMENTS 5 AND 7

CDC had by motion and brief sought to exclude evidence on issues not in the pleadings (Ad 66-80), yet on the day of trial, by supplemental brief (Ad

81-88), the trustee abandoned his original cause of action, and adopted the alter ego doctrine (Ad 82). CDC stated as to jury issues (Ad 89, 93). CDC's motion to exclude was denied (Ad 98). CDC demanded trial by jury and was denied (Ad 98). CDC had filed no proof of claim with the BR Court (Ad 89). The trustee had previously stated he was bringing complaint pursuant to § 157(b)(2)(K) to determine nature, extent and validity of any liens (AD 62).

B. CONFLICT

There was no equity in the learjet. Well known before sale, pursuant to 11 USC § 363(f), it was known by all, two claims, Union National Bank's ("UNB") of $678,952.20 (AP 410 Para 2), and the IRS's of $1,185,000.00 (AP 397 Para 3) excluding CDC's claim, exceeded the $1,562,050.00 the original trustee stated he intended to sell the aircraft for (AP 410 Para 1) by $302,000.00. Both the IRS (AP 396-400) and CDC (AP 404-406) pursuant to 11 USC § 362(d) filed motions for relief from automatic stay, and both were denied (AP 403,409).

The trustee objected to both removals from stay. A copy of the trustee's objection to the IRS removal and BR Court order denying same is in the appendix here (Ad 57-59). The IRS had control of the learjet by seizure well before the BR filing (AP 397 Para 5, A-9 Para 2). The trustee did not challenge the validity of either the UNB or the IRS liens, nor did he put on evidence against either at trial (AP 445,446) (Ad 28).

Bob McAdams ("McAdams") has never asserted let alone "continued assertion of an interest in CDC's lien" as the 8th Circuit states (Ad 5). McAdams was never a party to either adverse proceeding, or any cross or counter complaint (AP 216-227), nor

was he party on which any personal liability was attached to by the BR Court, the District Court or the 8th Circuit. McAdams was merely a witness called by the trustee (TR 115-217) and IRS (TR 433-449) and as a rebuttal witness by CDC (TR 559-730). Had he never been called by the trustee or IRS, CDC would not have called him. No determination was made that this proceeding was a "core proceeding".

C. DOCTRINE OF LIMITED LIABILITY

Not all money "flowed from BJMI to Parthenon ("PI") to CDC and from CDC back to BJMI" as the 8th Circuit states (Ad 14). $595,000.00 or 44.31% percent of the total loan flowed from individuals as an investment through CDC, of these, $368,500.00 first, then the remainder, $227,000.00 was then loaned to BJMI (AP 103). Proof was provided as to where the $368,500.00 came from as well as the $227,000.00 (AP 59-61). This particular money did not come from BJMI to start with and then was "loaned back to BJMI" as the 8th Circuit stated (Ad 6, 7). The money was used from a trust fund established in Robert McAdams' ("Robert") childhood, the trust was not in writing. Robert operated "on a borderline range of intelligence" (Ad 2).

The liens securing the individual invested funds preceded the March 28, 1990, BR petition by over one year (AP 518, 531). There was no insolvency of the debtors at the time the funds were loaned (AP 104, 537-552). Total loan proceeds, as to where they originated at by percentage and amount are contained in (AP 141). Disposition of all insurance proceeds paid PI is also found in (AP 141).

D. DOCTRINE OF ALTER EGO

Robert was not sole owner of both PI and CDC in all of 1989 as the 8th Circuit states (Ad 3), he was only the owner until March 23, 1989, which was over one year prior to the debtor, BJMI, bankruptcy filing of March 28, 1990, (AP 120,121) (A-9 Para 2). The 8th Circuit states Robert "almost always followed his father's instructions" (Ad 3). Authority for anyone to acquire PI is contained in Items Number 3 (PI is an affiliate of the lender) and 19 of the Security Agreement (AP 474,478). The word "certain" stated by the 8th Circuit (Ad 3) correctly quotes a PI Resolution that was misquoted by the BR Court by leaving out the word certain (Ad 21). The legal definition from Blacks Law Dictionary of the word certain is stated in the record (AP 325).

Secretary affairs of PI, initially called American Centennial Insurance Co., were not preformed by BJMI, but by P.M.M. (Peat Marwick and Mitchell) (AP 12-14). The 8th Circuit misstated at the outset, BJMI paid PI $42,000.00 per month for $500,000.00 worth of coverage, when in fact the coverage was $950,000.00 (AP 18). No PI "build up" of its capital reserve (Ad 4) was invested in CDC, for loan to BJMI (Ad 4, 5) until proper lien documents securing CDC collateral were properly perfected, in accordance with the applicable state and federal laws (AP 518,531,534,536), this was stipulated to below, as the 8th Circuit found (Ad 7).

The Loan Agreement is defined by the Uniform Commercial Code ("UCC") (AP 474, Item 1). No evidence was introduced that the Security Agreement drafted by McAdams was not in compliance with the UCC. McAdams never signed the Agreement on behalf

of CDC as the 8th Circuit stated (Ad 5). The 8th Circuit misstates "in mid 1988, the monthly premium paid by BJMI to PI was raised to $52,000.00, providing $1,000,000.00 coverage" (Ad 5, Para 2), when in fact the coverage was $1,450,000.00 (AP 20).

PI had ample capital reserve by way of its wholly owned subsidary CDC, it took, to pay the two judgments indicated by the BR Court it failed to pay. The learjet proceeds alone in which CDC's lien was filed before the IRS's, was approximately $882,000.00 after the first lien was paid (AP 410 Para 1 & 2). Such reserve was secured as just stated above. Furthermore there was a valid contratural agreement covering those two judgments (AP 477, Item 17). BJMI had been refunded approximately two thirds ($1,347,676.00), of the total premium it paid PI (AP 16), one of the conditions being these two judgments totaling approximately $370,000.00 (AP 23) would be paid by BJMI (AP 22). The learjet collaterial sold for $1,562,050.00 (Ad 7). At the time CDC obtained its asserted lien it owned 50% of PI Robert owned the other 50% (AP 121).

On March 23, 1989, CDC elected a CEO and two additional directors (AP 120). The 8th Circuit finding as to "McAdams exercised total control" over Robert (Ad 14), conflicts with the 8th Circuit (Ad 2), where it stated Robert "almost always followed his father's instructions" (emphasis added). The 8th Circuit found McAdams alone "... signed ... the agreement on behalf of both BJMI and Constellation" (Ad 14). This is the third time this issue is addressed by the 8th Circuit, first at (Ad 5) and second at (Ad 7). Respectfully, neither is correct, McAdams alone signed on behalf of BJMI, no signature was necessary for CDC (AP

485). In compliance with the UCC, state filings were signed by a James Murphy of CDC (AP 534,536).

The NLR terminal property owned by CDC was leased to BJMI under a real estate Lease/Purchase Agreement (AP 146-149). McAdams did not operate without regard "to any corporate formality" as the 8th Circuit states. Substantial corporate formality was followed seventy eight (78) times by CDC, DSI and PI alone over the three year period relevant here (AP 163-168).

CDC respectfully states that a review of the record below (AP xxxiv-xl, 1-169) will reveal that by referencing the record and appendix pages there to the facts as outlined here above (Pages 4-8), that each fact as stated is correct.

ARGUMENT

"AMPLYFYING THE REASONS RELIED ON FOR ALLOWANCE OF THE WRIT AND IN RELATIONS TO" QUESTIONS PRESENTED FOR REVIEW.

Pursuant to Rule 10 of the United States Supreme Court, compelling reasons exist for the exercise of this Court's discretionary jurisdiction.

Respectfully, as will be demonstrated below, the United States Court of Appeals for the Eighth Circuit has:

1. Decided a federal question in a way that conflicts with applicable decisions of this Court.

2. Rendered a decision in conflict with decisions of other United States Courts of Appeal on the same matter.

3. Decided a federal question in a way in conflict with a State Court (Arkansas) of last resort.

4. So far departed from the accepted and usual course of judical proceedings by rendering a decision that conflicts with its own applicable decisions, and sanctioned such a departure by a lower Court, as to call for an exercise of this Court's power of supervision.

Further in addition to the above, are United States Constitution 5 and 7 Amendment Rights and the national importance of having the Supreme Court decide the questions involved, of the Doctrines of Limited Liability and Alter Ego.

This is not only important to CDC, but literally to millions of private citizens and corporations, both public and private as well, if public policy and laws that have governed these two doctorines from the time of English or common law are to be upset by the 8th Circuit decision.

Respectfully, it is an important question of public policy for the Supreme Court, to decide if the rules that have governed these two doctrines are to be left intact, for only the Congress to change.

QUESTION (i) FOR REVIEW

(i) WHETHER CDC WAS DENIED DUE PROCESS, AND TRIAL BY JURY, PURSUANT TO THE UNITED STATES CONSTITUTION, AMENDMENTS 5 AND 7, ON AN AMOUNT OF MONEY OF OVER ONE MILLION DOLLARS.

At issue here is due process and right to trial by jury pursuant to the United States Constitution, Amendments 5 and 7.

Simply put all three Defendants here were dragged into the BR Court by the original trustee. The regular BR judge, the Hon. Robert Fussell, had warned the original trustee several times, over the

last year, before trial, that from the beginning, this was a no asset case. Note: All hearings prior to, and after trial were conducted by Judge Fussell. The trial itself was conducted by the Hon. William A. Hill of Fargo, ND, sitting by special designation.

The trustee ostensibly brought this action under BR Rule 7001(2) to determine nature extent and validity of liens (Ad 62, 67-69, 89, 95-97), yet pursued no such issue at trial. By doing this and adopting the alter ego doctrine at trial, which CDC had submitted he had no standing to pursue such action in a no asset case, had the effect of ambushing CDC at trial (Ad 78). This at the same time had the effect of depriving CDC due process, in that they were denied trial by jury.

The following pertinent events taken from a trustee complaint filed December 19, 1990; answer of Defendant IRS filed January 9, 1991; CDC motion and brief to exclude evidence on issues not presented by the pleadings filed April 4, 1991; brief supplementing the pre-trial information sheet of Richard L. Smith, trustee, and trial transcript (AD 57-90), depict what transpired at trial, April 8, 1991, to April 11, 1991.

CDC had filed no proof of claim with the BR Court, because of the possibility of having a jury trial right as recognized by the Supreme Court in Granfinanciera, S.A. v. Nordberg, 492 US 33, 109 S.Ct 2782 (1989) (Ad 89).

CDC had by motion sought to exclude evidence on issues not in the pleadings. The motion asserts that in response to CDC's claim the IRS makes conclusory allegations of fraud, but failed to set up the particular circumstances, and accordingly asks the Court to exclude such. CDC argued these APs have been addressed solely to a determination

of lien priorities, with the one exception of "alter ego" made by the IRS.

With the exception of the IRS allegation, there have been no factual basis to disallow either CDC lien on any basis that would be fraudulent conveyance, equitable subordination or any number of other issues (Ad 91).

CDC contended the trustee or the IRS if they intended to prosecute such, should set forth a plain statement they're entitled to that relief, and by prayer demand what relief they request, neither of which has happened. CDC further stated since the complaints do not contain anything but conclusiory allegations of fraud, they fail to the particularity requirement, and by the pleadings no one could determine what the actual challenge to CDC is (Ad 91, 92).

Neither of the pleadings just mentioned complied with F.R.CIV.P. 8(a) and 9(b). See trustee complaint (Ad 61, 62) where it avers the trustee is bring a nature, extent and validity claim, as authorized by USC § 157(b)(2)(K). He further stated this at trial, and that CDC had filed no proof of claim (Ad 95, 96). This was further verified by the B.R. judge (Ad 96), and again when he denied CDC's motion to exclude (Ad 97, 98).

CDC stated only this morning, there was a supplemental brief filed by the trustee to disallow CDC's lien. There were some nine citations there, all of which say it requires fraudulent intent of the incorporators to use the corporation to support fraud, et cetera (Ad 92, 81-88).

The IRS in addition to having filed its motion for relief from stay, stated in an answer filed January 9, 1991, it "is not a sueable entity, and is not a proper party in an adversary proceeding

brought to determine the nature and extent of federal tax liens". It further asked the court to dismiss the complaint for lack of jurisdiction (Ad 63, 64).

CDC stated at this late date the trustee and IRS are attempting to advocate some cause of action not articulated or based on conclusory allegations of fraud we have not had adequate notice of. CDC should have been able to have the right, prior to being in trial, to list any allegations of fraud or illegality, or any motion to disallow our claim by a motion to dismiss, motion for summary judgment, or similar pleading.

CDC should have had the right to engage in meaningful discovery and without knowing the particulars of what they say constitutes this late date fraud, we have been deprived of our opportunity to know what witnesses we needed in Court here today (Ad 92, 93, 70, 71, 75).

On a different thrust if the trustee or IRS is attempting to advocate a fraudulent conveyance action at this point, then under the Granfinanciera case, there may be certain jury trial issues raised.

Without these issues being framed and properly before the Court, there is no way our client can have a meaningful forum within in which to decide whether it wants to request jury trial or not. If the IRS is trying to take away the jury trial right to do this, it may violate the Fifth Amendment due process clause (Ad 93).

> "The authorities which we have cited stand for the proposition that proof without allegation is just as impotent as allegation without proof, and we'd request the Court, since the representations to the Court by pleading and by letter is

> that this is a lien AP to determine the extent and validity and who gets the proceeds, that it stay a lien AP, and if there are other proceedings which they want to advocate, that they do so by other proceeding." (Ad 93, 94)

In spite of this CDC's motion was denied, and the trial proceeded, based solely on the "alter ego doctrine", which pursuant to Arkansas Law (the only applicable law that could apply here, as explained later here) is a fraudulent conveyance issue.

There were also substantial legal argument on this in the brief to CDC's motion (Ad 74-79). Thus since CDC had filed no proof of claim, it was entitled under Granfinanciera to trial by jury, and so demanded same which was denied (Ad 98).

Respectfully, the way the trustee, IRS and BR Court handled this proceeding deprived CDC of due process, and therefore CDC is entitled to trial by jury. Further this type process eleminated any chance CDC had to make the request for trial by jury pursuant to F.R.CIV.P. 38(b), in that it went directly to trial on the same day the trustee brought the alter ego or fraudulent conveyance charge.

Further that the trustee was pusuing an alter ego claim against CDC in addition to his charge brought on the day of trial, is that he argued piercing the veil, i.e. alter ego in his post trial brief (Ad 99-101).

It is plain to see this is a fraudulent conveyance, fraudulent preference case brought under, the pierce the veil or alter ego doctrine, on the day of trial to which CDC had no chance to defend. These charges pursuant to 28 USC §§ 157(b)(2)(F) and (H) are subject to the Amendment 7 right when no proof of claim has been filed or if,

it has not been waived, as is the case here.

Bringing the case pursuant to § 157(b)(2)(K) and switching to the charge just stated, with no notice, deprived CDC of due process, an Amendment 5 right.

Respectfully, despite the massive evidence of record, that the only charge pursued by the trustee here was alter ego i.e. fraudulent conveyance, the United States Court of Appeals for the 8th Circuit found the trustee was not pursuing such (Ad 10).

This Honorable Supreme Court has dealt with and settled matters like the Seventh Amendment issue here fairly recently in Granfinanciera, Syllabus id 34:

> "The Seventh Amendment entitles petitioners to their requested jury trial notwithstanding § 157(b)(2)(H)'s designation of fraudulent conveyance actions as "core proceedings" which non-Article III bankruptcy judges may adjudicate. Pp. 49-65."

Supra id 35:

> "Permitting jury trials in fraudulent conveyance actions will not significantly impair the functioning of the legislative scheme. It cannot seriously be argued that allowing such actions in a trustee's suit against a person who has not entered a claim against the estate would "go far to dismantle the statutory scheme," as that phrase was used in Atlas Roofing, supra, at 454, n. 11, since Atlas plainly assumed that such claims carried with them a right to a jury trial. In addition, it cannot easily be said that a jury would be incompatible with bankruptcy proceedings, since Congress has expressly provided for

> jury trials in certain other actions arising out of bankruptcy litigation. The claim that juries may serve usefully as checks only on life-tenured judges' decisions overlooks the potential for juries to exercise beneficial restraint on the decisions of fixed-term judges, who may be beholden to Congress or the Executive. Moreover, although providing jury trials in some fraudulent conveyance actions might impede swift resolution of bankruptcy proceedings and increase the expense of Chapter 11 reorganizations, these considerations are insufficient to overcome the Seventh Amendment's clear command. Pp. 61-63.
>
> 835 F2d 1341, reversed and remanded."

There is no doubt CDC did not file a proof of claim with the BR Court, did not waive trial by jury, the amount of proceeds at issue here is over $1,000,000.00 (one million dollars) and CDC demanded trial by jury. This demand started at the very beginning of trial, when CDC first learned of the fraudulent conveyance charge the trustee intended to pursue against it, and was raised by CDC at every level of this proceeding up through the 8th Circuit, but was never commented on by any Court, except for the one word "denied" by the BR Court.

Thus this Court is CDC's last chance that justice will prevail in this case on its 5th and 7th Amendment rights.

QUESTION (ii) FOR REVIEW

(ii) WHETHER THE UNITED STATES, BANKRUPTCY COURT, AS AFFIRMED BY THE U.S. DISTRICT COURT AND

8TH CIRCUIT COURT OF APPEALS ERRONEOUSLY APPLIED THE ALTER EGO DOCTRINE IN DECLARING CONSTELLATION DEVELOPMENT CORPORATION'S LIEN CLAIM AGAINST THE DEBTOR HERE NULL AND VOID.

A. CONFLICT

On the fraudulent conveyance, alter ego, pierce the corporation veil issue, the 8th Circuit decision is in conflict with the following decisions of the U.S. Court of Appeals for the Eighth Circuit or this court.

Ozark Restaurant Equipment Co., Inc., 816 F2d 1222 (8th Cir 1987); State of Missouri v. U.S. Bkrtcy Court, etc., 647 F2d 768 (8th Cir 1981), Cert denied, 454 U.S. 1162 (1982; In re Gran, 964 F2d 822 (8th Cir 1992); N. S. Garrott and Sons, 772 F2d 463 (8th Cir 1985); Johnson v. First National Bank of Montevideo, 719 F2d 270 (8th Cir 1983), Cert denied, 465 U.S. 1012 (1984); Erickson v. Federal Land Bank of Omaha, 101 B.R. 124 (Neb 1989), Affirmed, 894 F2d 1342 (8th Cir 1989); Lumber Exchange v. Mutual Life, 125 B.R. 1000 (Minn 1991), Affirmed, 968 F2d 647 (8th Cir 1992); Rath Packing v. United Food, 75 B.R. 137 (1987), Affirmed, 860 F2d 1086 (8th Cir 1988); Smith v. Porter, 143 F2d 292 (8th Cir 1944); Hi-pro Fish Products v. Robert Y. McClure, 346 F2d 497 (8th Cir 1965); United Savings Assn, v. Timbers of Inwood Forest, 484 U.S. 365 (1988); Caplin v. Marine Midland Grace Trust Co., 406 U.S. 416 (1972); Anderson v. Abbott, 321 U.S. 349 (1944); Baker v. Raymond International, 656 F2d 173 (5th Cir 1981), Cert denied, 456 U.S. 983 (1982); United States v. Whiting Pools, Inc., 462 U.S. 198 (1983); Phelps v. United States, 421 U.S. 330 (1975); First Nat. City Bank v. Banco Para El Comercio, 462 U.S. 611

(1983); Granfinanciera, S. A. v. Nordberg, 492 U.S. 433 (1989).

Example: Respectfully, contrary to the 8th Circuit "Opinion" (Ad 10), the trustee did assert the alter ego doctorine not only against CDC and other corporations, but McAdams himself individually, who was not a party to the complaint (Ad 27) (AP 216). This conflicts with Ozark, 1225. The trustee put on no evidence under 28 U.S. §§ 157(b)(1) and 157(b)(2)(k), and BR Rule 7001(2) to determine the validity, extent and priority of liens under which his complaint was brought. All he asserted was an alter ego action on hehalf of the IRS, and nothing on behalf of the estate. Consideration by this court is necessary to secure and maintain uniformity of decisions in this court.

Property of the estate does not include anything described in 11 USC § 363(f). 11 USC § 362(d)(1)(2), requires relief from the Automotive stay be granted if any one of the three requirements; lack of adequate protection; debtor has no equity, or such property is not necessary for reorganization is present. Erickson v. Federal, 101 B.R. id 127; Lumber Exchange v. Mutual Life, 125 B.R. id 1009; See also United Savings v. Timbers, 366, 375. The debtor, BJMI, was in liquidation, property was not necessary for any reorganization. Here is was mandatory the relief from stay motions by the IRS and CDC be granted.

The trustee stated he was selling the learjet pursuant to 11 USC § 363(f) (AP 418). Clearly this is not allowed for because the trustee established none of the alternating prerequisites required by 363(f), Missouri v. Bankruptcy Court, 778.

While the alternative prerequisites of 363(f) are disjunctive the basis for selling free and clear of liens, when lienholders have not

consented, are existence of equity or existence of a good faith dispute. Collier on bankruptcy § 43.03(3).

It is plain there was no equity, nobody disputed that UNB had a first priority. The trustee stated on August 20, 1990 (AP 410), over two months before receiving sale authority on November 14, 1990 (AP 421), he intended to pay UNB. The IRS motion for relief from stay, April 20, 1990, over six months before sale, stated there was no equity, and listed the nearly $2,000,000.00 in liens on the learjet in addition to its secured claims of $1,185,510.99 (AP 398, 397), it also stated a "lack of adequate protection" and UNB agreed with its motion (AP 399). Needless to say CDC also agreed with the IRS motion since as stated, it had filed its own motion for relief from stay. From this it can be seen there was no good faith dispute, UNB was to get the first approximate $680,000.00 and either the IRS or CDC was to get the remainder.

There is a duty under the code (11 USC § 363(f)) to protect the property interests of third persons, and adequate protection must be taken, as will result in an "indubitable equivalent (11 USC § 361(3))", Missouri, 778; United Savings v. Timber, 366, 370, 377.

The entire secured IRS tax liens (AP 391, 392), although they were perfected well after CDC liens (AP 518, 531) still take priority over any action the trustee could assert on behalf of the estate, as they were perfected before the bankruptcy filing (Ad 26). The entire IRS tax claim is secured - all needs to be done is tax lien filed. Gran, 828.

Despite the obvious lack of no equity in the learjet, the trustee by motion presented to the BR Court November 14, 1990, moved to sell the learjet

(AP 421), and by complaint filed January 18, 1991, named UNB, CDC and the IRS. Further despite naming UNB and the IRS he put on no evidence against either of them (Ad 18, 28).

Respectfully, to this honorable court, U.S. v. Whiting Pools, a reorganization case, as relied upon by the 8th Circuit (Ad 11), does not define a liquidation case, as is the case here. In fact it expresses no view on a liquidation case. Whiting, 209 N 17.

It is however, made plain that turnover is not required. When the property is of "inconsequential value or benefit to the estate, § 542(a)." Whiting, 205 N 12. Here there was no equity, and since the estate was liquidating no benefit. With turnover not required, "interests in the seized property that could have been exercised by the debtors - in this case ... by virture of § 541(a)" were limited to "the taxpayer is entitled to any surplus of the proceeds of the sale, § 6342(b)". Whiting, 207 N 15, citing N 4 at 201. Thus the trustee had no authority under § 363(f) to sell the property, and no authority under BR 7001(2) to bring this action, to start with.

Further it appears Whiting defers to Phelps v. U.S. in a liquidation case. Whiting 210 N 18. "Notice of levy and demand are equivalent to seizure." Phelps 337. Here seizure had been made. "The pre-bankruptcy levy displaced any title...". Phelps 337 N 8. Thus with this finding the learjet and its proceeds were not property of the estate as the 8th Circuit noted (Ad 11).

More imporant and what is the very heart of this case, respectfully, as far as the trustee is concerned, is the significant finding in Phelps,

> "Where the government has a tax lien on the property, the consequence of the

> turnover is to subordinate that lien to the expenses of administration ... claims",

this subjects the IRS to

> "... the difference between holding the property subject to prior payments of administrative ... claims and holding it outright." Phelps 333 N 2.

There were some priority wage claims, but the trustee had other sources of funds to pay these.

Respectfully, although the 8th Circuit did not address the issue, it is undisputed, trustee participation in this case, has cost the estate over $200,000.00 (CDC's Appeal Brief Pages 24-27, AP 447-471,471(B). As stated, for this the trustee challenged neither the UNB or IRS liens (Ad 19, 28).

Respectfully, to this honorable court, the 8th Circuit affirming this appeal on theories of "We are not confronted with an alter ego action brought by the trustee" and "Validity, extent, and priority of competing liens" (Ad 10) is in conflict with Ozark, Caplin, Phelps and Whiting.

Further:

> "no where in 11 USC § 544(a) or (b), nor in other relevant provisions of the code is there any suggestion that the trustee has been given authority to collect money not owed to the estate". Ozark, 1229, 1230, from Caplin.

Here is is plain and simple, proceeds from the learjet were not owed to the estate, they were first owed UNB, and if not CDC first, they were in fact owed the IRS. In any instance, it was clear, well before any sale, there was no equity in the learjet for the estate.

Equity can not apply as the 8th Circuit stated

(Ad 15), where party asserting cause of action for relief does not have standing under any other section of the code, 11 USC § 105. Johnson v. First National Bank of Montevideo, 273.

Pursuant to 28 USC § 157(b)(3):

> "the bankruptcy court shall determine on the judge's own motion or on timely motion of a party, whether a proceeding is a core proceeding under this subsection". Rath Packing Co. v. United Foods, 75 B.R. id 138.

Here no such determination was made.

B. DOCTRINE LIMITED LIABILITY

It is irrelevant "no written documents" evidencing Robert's trust were presented to the BR Court. Such is not necessary according to Arkansas law where pursuant to an implied trust a constructive trust arises, N. S. Garrott and Sons, 467. Such trust does not have to be in writing, Andres v. Andres, 1 Ark App 75 (1981).

It is a common occurrence for shareholders to invest individually in corporations, both public and private, and these invested funds where proper security is taken, and where there was no insolvency finding of the debtor, at the time the funds were loaned, according to law (a USC §§§ 101(31)(1), 547(b)(4)(A)(B),548(a)(1)) should be returned to CDC:

> "Under the doctrine of limited liability, the owner of a corporation is not liable for the corporation's debts. Creditors of the corporation have recourse only against the corporation itself, not against its parent company or share-

holders." Baker, 179. "Limited liability is the rule, not the exception; and on that assumption large undertakings are rested, vast enterprises are launched, and huge sums of capital attracted." Anderson, 362.

C. DOCTRINE OF ALTER EGO

The twenty three asserted trial court errors (A i-vii) were the subject of testimony and documentary evidence in conflict with the BR Court order. This was not a conflict between testimony and documentary evidence, respectfully, as the 8th Circuit found (Ad 12). They were abstracted exactly to the evidence of record (AP 1-104).

DSI is a non issue in this proceeding. DSI was not a party to any of the loan proceedins, nor tried to make any claims against the estate. Any DSI taxes owed were included in the IRS proof of claim which was not contested (Ad 5, 6, 8).

There should be no question here the statute of limitations had run under federal bankruptcy law. As stated above CDC's lien perfections proceeded BJMI's bankruptcy filing by over one year (CDC's first lien perfection was January 5, 1989 (AP 518)), last was February 27, 1989 (AP 531), BJMI bankruptcy filing was March 28, 1990. The date of filing is critical. Hicks 144 B.R. 419, 420 (Ark 1992). Transfers are deemed to have occured at time lien is perfected, if perfections occurs before bankruptcy filing. Tucker, 55 B.R. 78, 80 (Ark 1984).

According to the above since over one year had passed 11 USC §§ 547, 548 had expired, and § 544(b) had to apply. This brought in to play the only law that could apply, the Arkansas Fraudulent

Conveyance Act, A.C.A. § 4-59-204. "In contract cases, fraud is an essential element of the alter ego finding." Edwards Co. v. Monogram Industries, 730 F2d 977, 980-981 (5th Cir 1984) (en banc). Here there was no fraud found or present.

CDC does not dispute the BR Court has jurisdiction over the trustee's actions. However, respectfully, CDC disagrees with the 8th Circuit (Ad 10) that the trustee has standing to pursue an adversary proceeding to determine validity, extent and priority of liens asserted against estate property under 28 USC §§ 157(b)(1), 157(b)(2)(k) or under BR Rule 7001(2) in a no asset case.

11 USC §§ 541(a) and 541(b)(1) defeats all causes of trustee in a no asset action, to include those just stated. While the estate had legal title to the learjet, the estate had no equity in the property to be liquidated for the benefit of creditors, Cowden 154 B.R. 531 (Ark 1993). Further the 8th Circuit while stating the statute (Ad 11) failed to acknowledge the key limiting language in section 541(a)(1) - property of the estate comprises only "legal and equitable interests of the debtor" (emphasis added), Ozark Rest. Equip. Co., 1224, from Caplin. As stated above BJMI had no equity in the learjet.

The 8th Circuit states relying on Koch, trustee has a right to bring a general action on behalf of all creditors, but not a personal one on behalf of only some (Ad 9), yet that is exactly what happened here, no general action on behalf of all was brought, the trustee only sought a personal one on behalf of only one, the IRS. A persual of the lower court docket pages of record alone (AP i-xx), reveals several dozen creditors. A review of the claim file (not of record) reveals over a thousand, yet the trustee as state sought recovery

for only one. This is clearly not allowed for under Arkansas law. Hi-Pro Fish Products v. McClure, 498.

In Re Xonics, Inc. the case the 8th Circuit relied on that BR courts can resolve competing liens (Ad 11) is a 7th Circuit case, is not controlling where Arkansas law is applied, and as just states is contrary to Hi-Pro, an 8th Circuit Arkansas case, finding no trustee participation is necessary. Further, as Xonics states, bankruptcy court lacks authority to sell when property leaves estate, as is the case here, Xonics, 381.

Further of the several alter ego Arkansas cases the 8th Circuit cited (Ad 13), it failed to note the key limiting language that generally applies as stated in Henderson v. Rounds, 381.

> "... trustee stands in shoes of bankrupt corporation in prosecuting a course of action belonging to bankrupt, and when applicable state law makes such obligations run to corporate creditors personally, rather than to corporation, such rights of action are not assets of estate, which are enforceable by trustee." (emphasis added)

Henderson and this same language is quoted in Ozark, 1225. As before stated and the evidence reveals, affirmed by the BR court order itself (A 10), the trustee asserted only the alter ego doctrine on behalf of the IRS. Furthermore, that trustee alleged only alter ego see (Ad 81-88), the pre trial brief trustee filed. All that needs to be done, to determine trustee was bringing an alter ego action here, is review trial transcript, where trustee is on.

Further as to the control, manipulation and

etc. aspect the 8th Circuit raised in citing the Arkansas cases (Ad 13-15), there are many more cases, both Arkansas and federal, with stronger language, contrary to the ones cited, which do not support the alter ego doctorine finding against CDC.

The following is a representative listing without quoting each case separately, of such cases that rebuts generally, the cases cited. Atkinson v. Reed, 185 Ark 301, 306 (1932); Manon v. R.A. Young, 207 Ark 98, 103 (1944); Charles Keeshin, Inc., v. Farmers and Merchants Bank of Rogers, 199 F Supp 478, 486 (Ark 1961); Lange v. Burke, 69 Ark 85, 86 (1901); G. W. Jones Lumber Co. v. Wisarkana Lumber Co., 125 Ark 65, 66 (1919); Fairfield Plantation, Inc., 147 B.R. 946, 951 (Ark 1992); Fort Smith Light and Traction v. Kelley, 94 Ark 461, 571 (1910). Also see Edwards v. Monogram, 984-986.

The above cases generally state/support, as stated by the 5th Circuit;

> "... in some sense, every subsidiary is the alter ego of its parent company. Where the subsidiary is wholly-owned by the parent and has the same directors and officers, operating the subsidiary independently of the parent company not only has little practical meaning, it would also constitute a breach both of the subsidiary's duty to further the interests of its owner, and of the directors' and officers' duty towards the parent company. Nevertheless, cases are clear that one-hundred percent ownership and identity of directors and officers are, even together, an insufficient basis for applying the alter ego theory to pierce the corporate

> veil. Instead, we maintain the fiction that an officer or director of same corporations can change hats and represent those corporations separately, despite their common ownership." (emphasis added) Nelson v. International Paint Co., 734 F2d 1084, 1092 (5th Cir 1984); Miles v. A. T. & T., 703 F2d 193, 195 (5th Cir 1983).

It would not be inappropriate here, where one's son is impaired, to change hats. The BR court, District court and 8th Circuit all found Robert mentally challenged (Ad 19, 17, 2), yet used this to attach the alter ego doctrine here.

The debtors association with the corporations were disclosed in audited financial statements (AP 561, 562).

The U.S. Supreme Court has stated applying the alter ego theory is to be "an exceptional one", City Bank v. Banco Para, 629 N 20. From City Bank it is respectfully submitted CDC is not such "an exceptional one".

Further as concerns the transfers are undermined by incoherence of the agreement, McAdams drafted same, and by his continued assertion of an interest (Ad 5). The agreement was drawn according to UCC requirements and governed by it (AP 474). The agreement is very specific, and carefully drawn and itemized (AP 474-485), Page 4 of the agreement is missing, but can be found at (AP 64). There is Arkansas case law to support McAdams drafting the agreement, and even negotiating the agreement on both sides, wearing two hats, Fort Smith Light, 469, 470. As stated in Facts above, McAdams has never asserted an interest in CDC's liens. Also see Fort Smith on (Ad 77).

Respectfully, it is CDC's belief that the 8th

Circuit affirming it as an alter ego is an error by the 8th Circuit in determination of state or federal law. Particularly here is Arkansas state law as applied under 11 USC § 544, and BR Code 548 (Fraudulent Conveyances).

It is CDC's belief that its Writ should be granted, as the 8th Circuit findings are clearly erroneous, Smith v. Porter, 294.

QUESTION (iii) FOR REVIEW

(iii) WHETHER PIERCING THE CORPORATE VEIL OR ALTER EGO, AS IT IS KNOWN, IS NORMALLY TRIED BY JURY, WHEN FACTUAL ISSUES EXIST.

Respectfully, the 8th Circuit recognizes, that matters such as fraudulent conveyences, i.e. alter ego, and piercing the corporate veil are jury matters. See United Missouri Bank of Kansas City, N.A., 901 F2d 1449 (8th Cir 1990).

> "Creditor which had not filed claim in bankruptcy case had constitutional right to a jury trial in suit brought by trustee seeking to avoid allegedly preferential transfers. U.S.C.A. Const. Amend. 7." United, id 1449

Respectfully, to make matters even worse, the 8th Circuit, recently in 1995, affirmed the finding just above, yet shortly after that made no mention of CDC's demand for its 7th Amendment rights in its opinion here on September 20, 1995 (Ad 1-15). See Smith v. Dowden, 47 F3d 940 (8th Cir 1995).

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved...." U.S. Const. Amend. VII." Smith id 941.

Supra:

> "... this case is squarely controlled by the Supreme Court's decision in Granfinanciera. Because the Partners have not submitted to the equitable jurisdiction of the bankruptcy court, the Trustee's fraudulent transfer action does not arise "as part of the process of allowance and disallowance of claims," 492 U.S. at 58, 109 S.Ct. at 2799 (quotation omitted),..." id 943

Supra:

> "As such, the Partners retain the right to a jury trial on the Trustee's fraudulent transfer action. ID. at 57-59, 109 S.Ct. at 2798-99." id 943

Further the trustee, James Dowden, in Smith v. Dowden is the same trustee as is here. Respectfully, this Court should not let such conflicting decisions stand as exists here between this case and Smith v. Dowden on the same matter.

Further CDC submits pursuant to F.R.CIV.P. 39(b) it is entitled to its Amendment 7 rights. See Littlefield v. Fort Dodge Messenger Service, 614 F2d 581 (8th Cir 1980).

> "... we agree that courts "ought to approach each application under Rule 39(b) with an open mind," 9 C. Wright & A. Miller, Federal Practice and Procedure § 2334, at 116 (1971), and that jury trials ought to be liberally granted when no prejudice results,..." id 585

This was later affirmed by the 8th Circuit in United Missouri.

> "The bankruptcy judge found the jury trial demand untimely but granted the

motion under Fed.R.Civ.P. 39(b)."

Supra:

> "We agree with the bankruptcy judge that the Bank has a constitutional right to a jury trial under Granfinanciera. We also find the bankruptcy judge did not abuse her discretion in granting the jury trial under Fed.R.Civ.P. 39(b)." id 1450

Under federal law the right to trial by jury in civil matters depends upon whether, consistent with the 7th Amendment, the rights sought to be enforced are legal or equitable in nature. See Tull v. United States, 481 U.S. 412, 417-18 (1987); Granfinanciera id 42; In re Harbour, 840 F2d 1165, 1171-71 (4th Cir 1988). Here the rights sought to be enforced are legal in nature.

Because piercing the veil is rooted in both law and equity, the right to trial by jury turns on the nature of the relief requested and the presence or absence of factual issues. Passalacqua Builders, Inc. v. Resnick Developers South, Inc., 933 F2d 131, 138-39 (2nd Cir 1991).

There is a string of United States Circuit Court of Appeals cases that supports this just above.

American Protein Corp. v. A.B. Volvo, 844 F2d 56, 59 (2d Cir) ("the issue of corporate disregard is generally submitted to the jury"), cert denied, 488 U.S. 852 (1988); Luckett v. Bethlehem Steel Corp., 618 F2d 1373, 1379 (10th Cir 1980) (whether to disregard the corporate entity "is a fact question which should ordinarily be submitted to the jury"); Key v. Liquid Energy Corp., 906 F2d 500, 503 (10th Cir 1990) ("whether a separate corporate structure was adopted for the purpose of fraud or illegality is ordinarily a fact question for the jury")' FMC Finance Corp. v. Murphree, 632

F2d 413, 421 n 5 (5th Cir 1980) ("this Court holds that the issue of corporate entity disregard is one for the jury").

Respectfully, there is no doubt this is a "piercing the veil" case, rooted in law.

CONCLUSION

Respectfully, this Court should grant CDC relief, by reinstating its lien voided by the BR Court, or in the alternative remand this case for trial by jury as CDC demanded.

Respectfully submitted;
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